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ABSTRACT

One of the fundamental rights guaranteed by the Education of the Handicapped Act is the right to an impartial due process hearing. Such hearings are often difficult and emotionally draining experiences. They need not be so difficult, however, because proper and sensitive preparation for a hearing can minimize its negative emotional impact. This monograph presents fundamental information about the hearing process, followed by a practical step-by-step guide to help school system personnel prepare for due process hearings and their aftermath. (Topics covered include: grounds for a hearing, the impartial hearing officer, parties and counsel, conducting the hearing, appeals, prehearing preparation, role of the attorney/case presenter, role of the witness, preparing to testify, and posthearing reactions. Appendixes include information on the Attorneys' Fees Act, a Case Preparation Checklist, a Testimony Preparation Guide, and a case study.) (Author/PB)

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PREPARATION FOR SPECIAL EDUCATION HEARINGS

A Practical Guide to Lessening the Trauma of Due Process Hearings

Richard E. Ekstrand
Patricia Edmister
Jane Riggin

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PREPARATION FOR SPECIAL EDUCATION HEARINGS

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Richard E. Ekstrand
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Introduction

One of the fundamental rights guaranteed under the Education of the Handicapped Act (EHA) is the right to an impartial due process hearing.

Hearings are often difficult and emotionally draining experiences. They need not be so difficult, however, because proper and sensitive preparation for a hearing can minimize its negative emotional impact. This monograph presents fundamental information about the hearing process (Part I) followed by a practical step-by-step guide to help school system personnel prepare for due process hearings and their aftermath (Part II).

PART I

Fundamentals of the Hearing Process

BACKGROUND

In 1975 the impartial due process hearing was formally introduced to the field of special education by means of the Education of the Handicapped Act (EHA). The regulations implementing this Act (34 Code of Federal Regulations [CFR], Part 300), however, gave no more than a cursory description of the fundamental elements and rights involved in an impartial due process hearing. Some of these regulations are discussed as a preamble to the guide for preparing for hearings.

GROUNDS FOR A HEARING

Initially, it is emphasized that either the local school system or the parents have the right to request a hearing if proper grounds exist. Federal regulations state that grounds for a hearing exist when the school system proposes or refuses to initiate or change the identification, evaluation, or educational placement of a handicapped child or the provision of a free appropriate public education to the child (34 CFR 300.505 and 300.504). In these situations, the local school system must send the parents advance written notice of its proposed or refused action. This notification must include a full explanation of all the procedural safeguards available to the parents—including the right to an impartial due process hearing if the parents disagree with the proposed or refused action (34 CFR 300.504–505).

Note: Part I has been adapted from "Preparing for the Due Process Hearing: What to Expect and What to Do" by R. E. Ekstrand, 1979, *Amicus, 4*, 91–96.

Under EHA, when parents are notified of the action proposed or refused by the local school system, they must simultaneously be informed of the means by which they can request a hearing. Although the local school system may simply ask the parents to submit a letter requesting such a hearing, use of a formal application is preferable. A formal application, with specific information to be completed by the parents, carries with it the advantage that the local school system can thereby obtain information relevant to the conduct of the hearing such as the specific issues involved, whether the hearing will be open or closed, and legal representation, all in a single document.

Although the federal regulations are silent on the period of time within which parents must request a hearing, they do specifically require that the local school system shall ensure that, once requested, the hearing is held and the decision mailed to the parties within 45 days after receipt of the request for a hearing. However, the hearing officer may grant an extension of time beyond the 45-day limit at the request of either party (34 CFR 300.512).

IMPARTIAL HEARING OFFICER

The local hearing is to be conducted by a hearing officer, who must be impartial: The federal regulations specifically indicate that the officer may not be an employee of the local school system involved. On the other hand, an individual is not considered an employee solely because the local school system pays that person to serve as a hearing officer. A further very general restriction is that the hearing officer may not have a personal or professional interest that might conflict with his or her objectivity in the hearing (34 CFR 300.507).

The due process hearing may be conducted by a three-member panel instead of a single hearing officer. This often gives a greater breadth of expertise for dealing with many of the complex issues presented during the hearing. In addition, the local school system often elects to have an attorney assist the hearing officer or panel; such a consultant can provide crucial guidance on legal issues arising during the hearing. Today, much more so than in the past, special education hearings involve multiple legal issues of alleged violations of the EHA.

PARTIES AND COUNSEL

Generally there are two parties to the local-level due process hearing—the local school system and the parents. There is no question

that preparation by both parties is the most important part of the hearing process. If the local school system and the parents are fully prepared, the hearing will flow smoothly and all necessary information will be presented in an orderly fashion, allowing the hearing officer to make a well-informed decision consistent with the law and appropriate for the child

The federal regulations provide that either party has the right to be represented by counsel (34 CFR 300.508). While legal representation is not necessary, the parties often can be greatly assisted in the preparation and conduct of a hearing by an attorney who is familiar with special education due process procedures. Although the hearing is less formal than judicial proceedings, many legal rights are involved. As a result, both parties often are represented by counsel. The local school system is required to inform parents of any available free and low-cost legal and other relevant services when a hearing is initiated or when the parents request this information (34 CFR 300.506). If the parents ultimately prevail in a special education case, they may be awarded reimbursement for attorneys' fees and costs (see Appendix A).

CONDUCTING THE HEARING

The conduct of the hearing will vary among local school systems. Because it is always an administrative hearing rather than a judicial proceeding, however, it is not intended to be a formal court procedure with strict rules to be followed. For example, hearsay evidence (i.e., testimony by a witness concerning statements made by other persons outside the hearing) is usually admitted. Nevertheless, to ensure an orderly process, the hearing should be conducted in a somewhat formal fashion. In addition, the regulations require that there be a written or electronic verbatim record of the hearing (34 CFR 300.508).

The impartial hearing officer will be in complete control of the hearing, much as a judge in court proceedings. The hearing usually begins with an opening statement by the hearing officer specifying the rules and format of the hearing and ensuring that all persons present are identified for the record. The hearing officer may then consider any preliminary matters in need of resolution, including, for instance, such matters as objections by the parties to the "5-day rule" on disclosure of evidence. (All documents must be shared between the parties at least 5 days before the hearing [34 CFR 300.508]). Failure to do so can result in the hearing officer excluding these documents from consideration.) At this time, the hearing officer should also be advised by the parties of any stipulations or agreements made

between them. When there is no dispute between the parties on certain matters (e.g., the diagnosis of the child's disability), this should be stipulated if possible, so that the real issues can be dealt with directly.

Once all preliminary matters are resolved, the hearing officer is ready to hear the merits of the case. First, each party is usually allowed an opening statement in which there is an opportunity to state briefly the points of disagreement and the respective positions on each point. This assists the hearing officer in focusing on the evidence that will follow the opening statements. It is critical to clarify the issues (i.e., complaints) before the hearing begins. Failure to do so will allow the hearing to proceed without necessary focus. (It is recommended that any party seeking a hearing specify in detail on the hearing application the issues to be presented.)

Next, the hearing officer designates which party (i.e., parents or school system) is to first present evidence in support of that party's position. Once so designated, that party (e.g., the school system) will call its first witness to present evidence. That evidence consists of the documents and testimony of witnesses. During the course of the testimony, the opposing party may object to certain statements or documents being admitted. Generally, only evidence that directly relates to the issues (relevant and material evidence) given by a knowledgeable person (competent witness) should be admitted, but the hearing officer has wide discretion to accept any evidence that will aid him or her in reaching a well-informed decision.

When the school system's first witness has completed testifying (i.e., direct testimony or direct examination), the opposing party may question that witness (i.e., cross-examination). Thereafter the next witness for the local school system is called, with direct testimony and cross-examination following, until all witnesses for the school system have testified. The hearing officer is then advised that the local school system has completed its presentation of evidence. The parents (or their representative or attorney) present evidence in the same way, with direct and cross-examination of each of their witnesses, until their case is completed. At that time, the hearing officer may allow the party that presented evidence first to respond by presenting brief rebuttal evidence; after this, no further evidence is taken. Finally, the parties have an opportunity to make closing statements in which each indicates why the evidence presented supports that party's position. Upon completion, the hearing officer closes the hearing. The hearing officer must provide to each party written findings of facts and decisions on the issues presented within the time period allowed.

APPEALS

Under the federal rules, and if a state provides for a two-tier appeal, any dissatisfied party may appeal the decision of the local-level hearing officer to the state education agency. This appeal is a review of the local-level record. The official or panel conducting the impartial state-level review, however, may have a hearing to accept additional evidence, in which case the procedures and rights that existed during the local hearing would apply. Even if additional evidence is not taken, the parties will usually be given the opportunity to present oral or written arguments. The state hearing official will examine the entire local-level hearing record, ensure that due process requirements were met, make an independent decision, and provide the parties with the findings and decision within 30 days of the request for the review.

If any party is dissatisfied with the state-level decision, a civil action in an appropriate state or federal court, where a judicial review is conducted, may be sought as the next step.

PART II

A Practical Guide to Preparing for Hearings

PREHEARING PREPARATION

Careful preparation for the hearing is crucial to ensure that the hearing officer receives complete, accurate information with which to make a proper decision concerning the child's education. This information, or "evidence," usually is made available through documents such as student progress reports and evaluations and testimony of witnesses.

Preparation must begin immediately upon receipt of the hearing application; often there can be delays in receiving copies of information or contacting witnesses whose presence will be required at the hearing. Since federal regulations (34 CFR 300.508) state that the hearing officer may disallow introduction of evidence that has not been disclosed to the other party at least 5 days before the scheduled hearing, preparation essentially should be completed at least 10 days before the hearing date. That way, the names of witnesses and all documents intended for submission can be provided well within the time requirements.

ROLE OF THE ATTORNEY/CASE PRESENTER

The person responsible for preparation and presentation of evidence at the hearing is the attorney/case presenter. The necessary steps in fulfilling this role follow.

Step 1: Selecting Appropriate Documents

Appropriate, relevant, and informative documents should be selected from the student's records and organized in chronological order to give the hearing officer a comprehensive history of the child. The

documents should be numbered (e.g., School Exhibit #1, 2, 3, etc.) so they can be quickly located during the course of the hearing. These documents will provide a frame of reference for the hearing officer in terms of handicapping condition, educational interventions, and issues of contention that have brought the case to a hearing. These documents should include the following.

Child's School History. Many elements make up the profile of a child's history in any local school system. Careful documentation of the number of schools attended, the attendance record, report cards, progress reports, discipline referrals, and educational interventions need to be included in the history. If the issue is the child's ability to be educated for part of the school day in a regular program, progress reports from regular education staff and the absence or presence of discipline referrals may be central to a full analysis of the school system's position.

The history also gives the hearing officer a better understanding of how a school system is organized. Descriptions of educational interventions may include strategies available within the offerings of the regular education curriculum. These descriptions explain what the school system is prepared to provide the student within the "least restrictive environment." Such a complete and thorough history can provide many answers to the hearing officer's questions regarding the background of the case.

Clear Documentation on Identification of the Child's Handicapping Condition. Central to some due process hearings is the issue of handicapping condition. The documents submitted to hearing officers not only should provide the diagnostic "label" but should also describe the nature and severity of the handicapping condition. Appropriate evaluations may include psychological evaluations; educational assessments; medical reports; and reports of related services personnel such as speech/language, occupational therapy, physical therapy, and counseling. Care should be taken that documentation contains reports done by the qualified examiner as described in EHA and that any special requirements (e.g., those for identification of a specific learning disability, found in 34 CFR 300.540–543) are contained in the documentation.

Descriptions of the Programs and/or Services Being Proposed to Meet the Child's Educational Needs The individualized education program (IEP) usually will provide the necessary description of the program or services being proposed for the child. Additional documents that describe services for students in regular education,

such as course offerings or descriptions, may also be necessary to present a full and complete understanding of the child's program. If other community agencies will be involved in providing services to the child, a description of these services should also be contained in the documentation.

Anecdotal Notes. For some children special reports should be prepared which provide anecdotal records on the child's actions and behaviors; unusual changes in the child's progress; and the causes, if known. Occasionally, a case will necessitate observations by school personnel not ordinarily in contact with the child. These personnel may serve in the role of expert witnesses during the hearing, reporting the results of the observations. An anecdotal written record of those observations may need to be included in the documentation. They (and their inclusion) should be discussed at least 10 days prior to the hearing.

In addition, program modifications that have had a positive impact on school performance should be noted. It is particularly helpful to use a graphic presentation in developing these documents. Charts that reflect the impact of behavior management programs or graphs that use objective test data to show student progress can be very effective in synthesizing much of the data contained in the documentation.

A Chronology of the School System's Contacts with Parents. To help the hearing officer appropriately analyze the involvement between the parents and the school system, a chronology of contact should be provided. This chronology can be specially prepared or can take the form of copies of letters inviting parents to participate in multidisciplinary team meetings or IEP conferences, forms that parents have signed giving the system permission to test the child or to obtain the child's records, and communications regarding parents' due process rights. Telephone logs, when appropriate and available, and records of any school conferences should also be included.

Step 2: Choosing and Preparing Witnesses

The selection and preparation of witnesses can be difficult because the human element is introduced, with all its uncertainties. The choice of witnesses may be limited in that most often the staff who work with the child will be most credible to the hearing officer. Individuals who have evaluated or taught the child will be perceived to be in the best position to judge the appropriateness of the program being offered or to analyze the child's needs. It is extremely important that

the attorney/case presenter review the case and its documents early in the process to determine if additional evidence, testing, or observations by other school personnel will be needed. These persons would then be included as witnesses. This early review is necessary to allow all reports to be completed in time for 5-day-rule requirements. The attorney/case presenter should also look to witnesses who can serve as "experts" for the position of the school system. Individuals who are involved in the administration of specialized programs or who serve in supervisory capacities should also be considered in the selection process. Regardless of the choice, however, the ability of the witnesses to testify and respond effectively under direct and cross-examination is crucial. The attorney/case presenter therefore must be aware of the feelings and emotions of prospective witnesses as the selection decisions are made. The witnesses' feelings may include the following.

Anxiety and Defensiveness. Nervousness about what will happen and a general feeling of "why me?" are common. Witnesses may tend to personalize the filing of a due process hearing and feel that they have personally done something wrong that they will have to defend. It is important for the attorney/case presenter to assure the witnesses that they are not being personally sued nor are they personally responsible for the filing of the appeal. Witnesses need to know that they are a part of the school system and that decisions regarding the child in question have been made by the system acting as a team.

Anger and Resentment. Witnesses may feel that they are being singled out for some unknown reason that has nothing to do with the issue of the appeal or that they have been a victim of an unlucky circumstance. Others resent being taken away from their work responsibilities, which they believe to be far more significant than testifying at a hearing. Taking time to explain the importance of the hearing process both for the individual child involved and for the school system generally will go a long way toward reducing the anger some witnesses feel. It is essential that witnesses know they are important to the process and that their individual contributions are valued in reaching a proper decision for the child. School witnesses must understand that they truly are "child advocates."

Fear. School system professionals are rarely called on to submit their credentials to public scrutiny. Knowing that they will have to defend these credentials in front of colleagues and outside professionals can be frightening. Witnesses also express fear at having to face parents under adversarial conditions. A statement such as: "But I thought

we had a good relationship," is simply an expression of this fear. Perhaps the most prevalent fear among school system witnesses is the feeling that they will "let the school system down"—that they won't be prepared to answer questions or be articulate enough to explain a position and therefore will be an embarrassment to the system.

Careful preparation and sufficient briefing will lessen the fear of the witnesses. Confidence can be built only by the careful instruction of witnesses so that they have a clear understanding of what is expected of them.

Conflict. A feeling that the parents may be right in their challenge of the school system's position, coupled with a sense of responsibility and loyalty to the school system, can produce ambivalent and conflicting emotions in even the most seasoned professional. Witnesses can seem extremely confused as they struggle with feelings that either side could be "right." This confusion can sometimes be eliminated when the witness is informed of what the law requires of school systems. Whereas all school staff certainly wish to provide the best possible program for a handicapped student, the law requires that it be an appropriate program—defined as a program reasonably calculated to provide meaningful educational benefits.

During the briefing, a complete discussion of this matter, the issues, and the positions of both sides will be necessary to resolve any conflicts which might exist. Critical to this discussion is that witnesses understand that they will not be expected to testify against their professional judgments. Maintaining professional integrity is critical to not only the school system but the child involved.

Step 3: Becoming Knowledgeable About the Facts of the Case

To present an accurate and comprehensive position on behalf of the school system, both the attorney/case presenter and the witnesses must become completely familiar with all aspects of the case. Both must be familiar with all relevant facts relating to the child, the school history, the handicapping condition, and the school placement under consideration. Therefore, the attorney/case presenter and each potential witness must review all documents in the child's record, as well as documents the parents intend to submit as evidence at the due process hearing.

Witnesses also will need to be prepared to serve as "experts" on the records that will be presented during their aspect of the case. The witnesses who will be testifying regarding documents used to evaluate the child's cognitive ability will need to understand research concerning validity, reliability, and the appropriateness of the use of

the instruments with particular populations. Witnesses discussing achievement testing should understand standardization practices, be aware of any controversy over use of such tests, and understand the relation of tests to the curriculum. All witnesses should be prepared to link the evaluation data with goals and objectives contained in the IEP and the placement being offered. Particular care should be taken to effectively link the more subjective documents, such as classroom observations, with the child's needs as described in the more objective data contained in the file.

Sometimes it will be necessary to go beyond the written documentation to become fully knowledgeable about the case. If, for example, the parents are requesting an alternative private placement for the child, someone from the school system will have to be prepared to discuss the placement during the hearing. This will necessitate an observation at the private school and, if possible, interviews with the private school staff. In addition, if specific instructional techniques or methods are recommended in the parents' documents, research will have to be conducted to determine the appropriateness of these methods for use with the child.

Step 4: Conducting the Prehearing Briefing

Once appropriate documents have been gathered and witnesses selected, the attorney/case presenter should schedule a prehearing briefing. At this briefing, all witnesses—who, presumably, have previously reviewed the documents—meet to prepare their testimony for the hearing. The timing of this briefing should be far enough in advance of the hearing date to allow for complete preparation and to develop any additional materials or special reports that should be added to the case file.

The attorney/case presenter first must ascertain whether all witnesses are in agreement with the position of the school system. Witnesses must be informed that they are allowed and expected to express their individual professional judgment, and they must be assured that they will not be expected to testify in support of the school system if they disagree with its position. If several witnesses disagree with the school system, there is a serious question as to the merit of proceeding with the hearing; and a negotiated resolution should be considered. When there is agreement, the briefing can proceed.

Next, the attorney/case presenter must allow for a full and open discussion of the issues and contentions of the case. Time should be given for each individual to express his or her professional views about the issues in the case. Respect for the opinion of the witnesses

will go a long way toward developing a positive rapport to carry into the hearing. The difficulty may be to keep the discussion focused and concise, drawing out the withdrawn witnesses, and keeping the more vocal witnesses from dominating the discussion. Once the issues are identified, specific testimony can then be discussed.

The order of presentation of witnesses, for the most part, will follow the general categories outlined in "Step 1: Selecting Appropriate Documents." Frequently the first witness is an administrator, who presents a chronological history of the child's past education programs and progress. This is followed by witnesses who will address handicapping condition and evaluation data. The last witnesses will be the service providers at the proposed placement, who will discuss in detail how the program will meet the child's educational needs. Witnesses who have developed special reports or conducted additional observations and those who may bring a special expertise to the case should be included in the order in which they provide maximum clarity to the case presentation.

By making the first impression, the lead witness often has the effect of setting the tone for the hearing. The attorney/case presenter may wish to select the individual presenting the chronological history of the child not so much for his or her direct involvement with the child, but rather on such factors as the amount of experience with hearings or how comfortable the individual appears to be with the process. In any event, special care must be taken with the preparation of this witness.

In preparing witnesses for direct examination, the attorney/case presenter will develop a series of questions to be asked. These questions will assist witnesses in presenting their professional qualifications and clear and complete statements regarding their particular subject matter in the case. In addition, the attorney/case presenter will teach witnesses how to integrate answers with the documents and how to effectively assist the hearing officer in understanding the position of the school system. The attorney/case presenter also may want to give the witnesses copies of applicable sections of the EHA, state or federal regulations, or local policies and procedures that can assist them in understanding the factors underlying the school system's position. Such materials may include the exact criteria for the handicapping condition being considered, definition of "least restrictive environment," or what constitutes a qualified examiner. In addition, the attorney/case presenter may ask that witnesses bring the administrative and interpretive manuals for any tests administered to the child so that the witnesses can be fully prepared to respond quickly and accurately to questions regarding test administration, standardization, scoring, and test interpretation.

Each witness must be prepared to deal with cross-examination by the child's parents or their attorney. Possible cross-examination questions can be discussed during the prehearing briefing. Some of these questions will be suggested by the witness, some by other participants and, of course, by the attorney/case presenter; in any event, the prehearing briefing provides the opportunity for the witnesses to prepare and review their responses and to role-play in a cross-examination situation. Such role-playing can help an inexperienced witness be more comfortable about his or her performance. At this prehearing briefing, cross-examination questions also can be developed to clarify points concerning the testimony of the parents' witnesses.

Finally, the witnesses for the school system must anticipate that the parents will present witnesses who will disagree with the school system personnel. Frequently the school system witnesses will be familiar with the possible witnesses for the parents. If so, information about such witnesses should be elicited from school system personnel; this information will assist the attorney/case presenter in preparing possible cross-examination questions for that witness. Such things as credentials, general philosophy of education, and past demeanor in hearings, if known, can greatly enhance the attorney/case presenter's ability to prepare appropriate questions for use in the hearing. All this information will also allow for the preparation of effective rebuttal testimony.

Whereas preparation for direct and cross-examination is a critical part of the prehearing briefing, an equally important purpose is to deal with the fears and anxieties of the school system witnesses. This is the time to allow them to express their frustrations and concerns. Though time-consuming, such a process is essential in building a positive, cooperative attitude toward the hearing process.

ROLE OF THE WITNESS

"You are scheduled to appear as a witness . . . " is a phrase that causes turmoil in the hearts and minds of many school system employees as they are informed that they are to appear as witnesses in a due process hearing. The emotions felt by a witness depend on a variety of factors, such as the following:

1. The amount of experience the person has had participating in hearings.
2. The role the witness is to play in the scheduled hearing, that is, as a principal witness on whom a great deal depends, or as a secondary witness playing a less significant role.

3. The comfort level the person feels when placed in a situation requiring defense of his or her professional qualifications and actions.
4. The individual's familiarity with the case being considered.
5. The extent of the person's emotional involvement with the child and/or family.
6. The person's level of self-confidence.
7. The individual's belief in the appropriateness of the services being provided.
8. The witness' trust in the other witnesses and the attorney/case presenter.
9. The amount and quality of preparation for the due process hearing.

For the majority of first-time witnesses, the initial feeling is one of anxiety—often mixed with some degree of resentment or anger—at realizing they must present their professional credentials and judgments for public acceptance or criticism and defend those credentials and judgments without appearing defensive.

Classroom teachers are frequently the group that most anxiously approaches this task. "But I'm only a teacher" and "Am I really needed as a witness?" are common statements. These witnesses need to be helped to realize that they often (a) know the child best of all of the professionals; (b) understand the goals and objectives stated on the IEP because they developed them; and (c) can "teach" the hearing officer about the facts because teaching is what they do for a living. It is equally important to assure the witnesses that they will be expected to testify only in their areas of expertise and will not be responsible for the legal aspects of the case.

For other witnesses, the feeling is even more intense; they are actually afraid of being asked questions, afraid of facing the child's parents. They are afraid that other school system employees, the attorney, or school system supervisors will feel they did a poor job or "let the school system down in some way." For these individuals, a supportive caring atmosphere, coupled with attention to preparation, may minimize the fear but may not totally eliminate it. In some situations, consideration should be given to substituting another witness, if possible.

A third group of witnesses feels tremendous conflict between a sense of responsibility and loyalty to the school system and its position and a feeling that, in their professional judgment, the parents are right in their challenge or that the parents should be supported simply because "they are only trying to do what they think is best for

their child." As noted earlier, the prehearing briefing must resolve this particular conflict, or a mediated resolution is appropriate.

These feelings are real and are bound to affect the ability, credibility, and effectiveness of the witnesses. A witness who appears angry and irritated at having been asked to testify will often raise questions in the mind of the hearing officer as to the level of commitment the school system has to the child in question. It is therefore critical that the attorney/case presenter be aware of the witnesses' feelings and abilities and work with each individual to build an effective team for the due process hearing. This is often done by preparing testimony until the witnesses feel comfortable role-playing direct testimony and cross-examination. These simulations can greatly assist in building self-confidence in the witnesses. In fact some witnesses report that, in retrospect, the simulations in front of their colleagues were more difficult than the actual hearing. When they felt good about their answers in the briefing, they knew they would be able to answer effectively on the day of the hearing. By using praise and positive reinforcement and training witnesses in techniques of responding under pressure, the attorney/case presenter can assist the witnesses in managing their feelings and channeling their emotions into positive actions.

Proper preparation by witnesses is of critical importance, not only for effective testimony, but also as they assist the attorney/case presenter in preparing the case. Witnesses who clearly understand the direction the hearing is to take can suggest approaches that may be invaluable during the course of the hearing.

PREPARING TO TESTIFY

If possible, witnesses should be involved in the selection of documents discussed earlier. This process must be done in an orderly and timely fashion and should be coordinated by an individual within the school system designated as case manager. If there are questions as to relevance, they should be discussed with the attorney/case presenter. The number of documents should be sufficient to present a complete understanding of the case but concise enough so that the documentation is not redundant.

Each witness must closely review the documents in the school file that are germane to the issues in the case and must attend the briefing ready to discuss the data and address the issues. This means taking responsibility for understanding test data and methodologies, as well as being prepared to discuss the rationale for program selections. If new documentation becomes available prior to the hearing or

additional documentation should be generated, copies must be submitted immediately to the attorney/case presenter, since documents must be added at least 5 days in advance of the hearing date.

Witnesses in prehearing briefings must be sure to tell the attorney/case presenter everything that might be pertinent, for example:

1. *Personal position regarding the issues that might be supportive or detrimental to the school system's position.* (Issues at hearings frequently revolve around the amount of time a child should spend in regular education. Witnesses who have clearly articulated their position on "mainstreaming" and may have shared their opinion with parents should discuss the implication of these actions on the hearing with the attorney/case presenter.)
2. *Personal opinion regarding the effectiveness or appropriateness of the existing or proposed program.* (A witness may have had a negative experience with a proposed placement, such as a former student who did not do well in that placement. These circumstances should be carefully discussed to ascertain if they are germane in any way to the case at hand.)
3. *Any anticipated problems that might arise during testimony.* (Witnesses may have had either a personal or professional experience with witnesses appearing for the parent. Anticipating how that will effect the conduct of the hearing will need to be analyzed with the attorney/case presenter.)

During the prehearing briefing general instructions should be given to the witnesses in preparing them to testify during the hearing. These include the following:

1. Answer questions clearly, since all proceedings are taped or stenographically reported; as such, head nodding will not be recorded.
2. Present information in a straightforward, professional manner, citing supportive documents and staying within the context of the questions asked.
3. Pause before responding to questions to organize the answer.
4. Relax and regard the attorney/case presenter as someone who is there to assist and support the witness.

It is also important to give witnesses a preparation assignment to be completed the evening prior to the hearing. This preparation should include the following:

1. Carefully read all documents to be presented at the hearing.
2. Make sure that all documents to be cited are ordered in such a way that they are readily accessible.
3. Outline the responses to the questions that will be asked on direct examination.
4. Make a list of relevant facts, such as name of student, age, and handicapping condition, for easy reference during the hearing.
5. Get a good night's sleep.

Relating to Parents

One of the most difficult challenges during the period before a due process hearing is maintaining an effective working relationship among service providers, the child, and the family. Frequently, a due process hearing is not requested until after one or more years of parental unhappiness regarding the child's education. Although the service providers may have maintained some level of effectiveness up to this time, the petition for a hearing may draw confrontational lines; and emotions are often heightened on both sides. Nevertheless, in the best interest of the child, it is up to the service providers to maintain professionalism in all contacts with the parents and the child. School system personnel should maintain professional behavior, as follows:

1. Continue in their professional roles as teachers, service providers, or administrators, giving appropriate, friendly responses regarding the child's progress and status in the program.
2. Avoid getting drawn into discussions about hearing issues. Rather, they should use judgment and common sense regarding the types of questions to respond to. If unsure, they can check with the case presenter/attorney.
3. Avoid communicating with parents' attorneys, outside advocates, or other parent representatives with regard to hearing issues. Rather, they should refer these matters to the case presenter/attorney.

Maintaining Professional Relationships

Often parents and teachers develop close, personal relationships as a consequence of the parents' desire for assistance, advice, and support. Sometimes teachers make statements or share confidences in that positive relationship that may cause concern when the relationship changes. These confidences on the part of both teachers and parents can create embarrassment, anxiety, or apprehension when an appeal

arises. Administrators and supervisors must be available to discuss such concerns with staff.

Demeanor During Hearing

The demeanor of witnesses during the hearing is important to its successful conclusion, since the hearing officer can be influenced adversely if it appears that a witness does not take the process seriously. Even such things as manner of dress can set a positive or negative tone before the procedure begins. Witnesses must be cautioned that a hearing is a serious and somewhat formal process in which specific rules of conduct are followed, and they should be prepared to act accordingly. Among other things, they should be instructed in proper hearing behavior, as follows:

1. Arrive on time and return promptly from all breaks.
2. Maintain professionalism at all times. When testifying, this extends from addressing all participants by their proper name to explaining complicated data as many times as required for clarity.
3. Avoid unnecessary talking except when testifying. Information may be conveyed to the attorney/case presenter by note. Personal conversations are distracting at best and can be considered rude.
4. Avoid giving information either orally or by note to a witness while that person is testifying. This will result in an objection by the parents' attorney and it gives the impression that the witness testifying is less than competent.
5. Take notes that may aid the attorney/case presenter with direct or cross-examination. Specific questions can be handed to the attorney/case presenter during testimony.
6. Avoid discussing hearing issues with the hearing officer and the opposing party during breaks.
7. Maintain composure if witnesses are sworn (placed under oath). Witnesses should remember that a hearing is a legal, but quasi-judicial process.
8. Avoid "body-language" that conveys negative feelings. The less unnecessary movement during the hearing the better.
9. Stop testifying and wait until the question is resolved if there is an objection by either side.
10. Remember to talk directly to the hearing officer. The hearing officer is not an observer but the person (i.e., the judge) for whom the testimony is being presented so that an appropriate decision can be made for the child.

Direct Examination

Witnesses should be well prepared from the prehearing briefing for the questions that will be asked during direct examination (i.e., questions by the school system's attorney/case presenter to the school system's witness). The initial questions will provide the opportunity for the witness to cite name, position, and credentials, including academic degrees, certification/licensure, and pertinent work experience. The questions will then follow the format outlined during the prehearing briefing and will focus on the aspects of the case for which each witness has responsibility: school history, diagnosis, proposed placement, and so forth. During direct examination, witnesses may refer to personal notes and any cited documents. They also should be aware that hearsay testimony as to what another person said is generally permitted. Witnesses also need to know that the hearing officer may ask questions at any time during the procedures.

Cross-Examination

Cross-examination involves questions asked to school system witnesses by the parents' attorney. For witnesses, cross-examination is usually the most traumatic part of the hearing; thus it is important to prepare rigorously during the prehearing briefing. Witnesses can be expected to be challenged on the following points during testimony.

1. *Professional credentials.* Questions related to credentials will generally revolve around the witnesses' qualifications to deal with evaluation data or the experience of the individual with certain populations of children. Witnesses should be prepared to deal with those aspects of the case for which they are qualified.
2. *General knowledge of the child.* Witnesses should be prepared to answer questions related to the past and current progress and the extent to which that progress is commensurate with the child's measured ability. Questions related to future progress in the proposed placement should also be anticipated.
3. *Evaluation data.* Perhaps the most difficult cross-examination involves the appropriateness of the various evaluations used to develop the child's profile, upon which information educational decisions have been made. Witnesses should be prepared to answer questions concerning validity, reliability, norms, and standardizations. Witnesses who have conducted educational testing frequently will be questioned about the appropriateness of test selection and aspects of predictability related to progressive achievement.

4. *Approaches to service delivery.* When issues in the case involve the method of delivery of certain related services (e.g., individual versus group therapy or consultative occupational therapy versus direct services) witnesses will be questioned and asked to defend the appropriateness of the approach recommended by the school system. It is particularly useful if the witness is prepared to support the approach with research.
5. *Decisions regarding intensity of service.* In the same manner as questions involving the approaches to service, the witness will be asked to defend positions related to length of program day, number of hours of service for various aspects of the proposed program, or matters related to extended school or summer programs. Research that supports the school system's position can be especially useful.
6. *Knowledge of public and nonpublic alternative placement options.* Frequently witnesses will be asked to compare and contrast placement options. The more informed the witness is concerning the placements in question, the more comfortable he or she will be during this aspect of the case.
7. *All aspects of the documentation.* Nothing is more unnerving than being asked to explain a paragraph or line in a document included in an entire file of documents involving a child. Witnesses need to be prepared for this frequently used type of questioning. Familiarity with the total document and the importance of that document to the total profile of the child will aid the witness in answering the question. Witnesses should bring to the hearing their own copies of documents about which they will be testifying.
8. *General information concerning any aspect of the proposed placement.* Witnesses may be expected to know such information as functional or academic levels of other students in the proposed class, number of types of handicapping conditions, and quality of progress of the other students. First-hand class observation and graphs or charts summarizing such information may assist the witness in preparing for these questions.

When answering cross-examination questions, witnesses should respond as follows:

1. Give honest, succinct, and sufficient answers to questions without volunteering tangential or irrelevant information. Listen carefully to the question and ask for clarification if needed.
2. Defer to another witness if necessary and appropriate. If the witness is certain that a colleague can better answer the question (e.g., a speech therapist may defer to a psychologist on questions

of psychological testing) then the question should be referred to that individual to answer.

3. Take time to reflect before answering. This will also give the attorney/case presenter for the school system an opportunity to object to the question if appropriate.
4. Do not be defensive. Witnesses should be helped to understand that cross-examination provides them with another opportunity to explain the school system's position. Using questions for this purpose is possible only when witnesses have been thoroughly prepared.
5. Say "I don't know" if that is the case, and then leave it at that.
6. Do not respond to silence. When a witness has concluded an answer to a question, the parents' attorney may pause before asking additional questions. When this occurs, "silence is golden"—the witness need not feel responsible for filling the void. If the witness responds unnecessarily during the gaps, the responses will elicit additional questions that can prove troublesome for the witness.
7. Ask clarifying questions. When a witness is unclear about the question being asked or if a question has multiple parts, the witness should ask for an explanation or clarification from the parents or the parents' attorney.

At the end of the cross-examination, any needed clarification or elaboration of responses will be elicited by a redirect examination by the attorney/case presenter for the school system. (See Appendix B for a sample Case Preparation Checklist, Appendix C for a Testimony Preparation Guide, and Appendix D for a Case Study.)

POSTHEARING REACTIONS

Staff Feelings

During the course of a multiday hearing—or at the conclusion of the hearing itself—there is often a feeling of tremendous anxiety and "let down" on the part of the witnesses. When a hearing continues for more than one day, it is critical that the attorney/case presenter review the day's proceedings with witnesses to help staff know how they did, and to review their testimony and that of the parents' witnesses to help with planning further testimony or cross-examination. Witnesses need to feel confident about their position and their ability to present that position; thus, the attorney/case presenter must do what is needed to imbue witnesses with

self-assurance. When the hearing is completed, a debriefing is needed to help staff feel positive about the hearing and to make the activity a learning experience for the next time. An informal posthearing critique is a valuable tool to help witnesses relieve the tensions built up during the hearing.

A debriefing session with staff immediately after the hearing is recommended. At this time, staff can express their views openly about their experiences as witnesses. The attorney/case presenter should provide positive feedback as a part of the case analysis. If a witness has seemed especially traumatized by the cross-examination, the case presenter or an appropriate staff member must review the witness' testimony, talking the witness through not only the factual aspects of the presentation, but also the witness' feelings and how the testimony was received by the hearing officers or panel. If the witness or his or her testimony was obviously negatively received, that must be dealt with honestly, but with suggestions for how it could have been presented, or prepared for, differently.

If a witness' presentation was especially good, that too should be discussed so that his or her positive self-concept is reinforced, and so that the specific elements that made it successful can be identified for future reference.

This debriefing session can also be a valuable learning experience for the attorney/case presenter. Through hearing and examining the reactions of the witnesses, the case presenter can discover possible errors or omissions in his or her own preparation and prehearing briefings—areas in which witnesses realized, perhaps too late, that some issue had been omitted or not deemed as important as it subsequently became.

Finally, it is extremely critical that witnesses who seem to be especially traumatized, those who believe they have been treated harshly by the opposing side, be offered an opportunity for counseling by other appropriate staff. There have been instances of valuable service providers leaving the education system as a consequence of the stress of hearing participation. Though such a response is rare, it does occur. It can be avoided with timely, sensitive intervention by the attorney/case presenter or appropriate staff.

Relating to Parents

One of the most difficult aspects of the hearing process for staff is the emotional tension felt between them and parents both during the hearing itself, and even more, following completion of the hearing—before and after the decision has been announced. The adversarial nature of a hearing, no matter what the issues, often negatively affects

the parent-provider relationships. Often statements are made by witnesses on each side that question the motives or competencies of those involved. The feelings such statements generate may contribute to difficulty in establishing or maintaining a positive, beneficial cooperative relationship. It is critical, however, that staff make a strong effort to create a good working relationship with the parents for the benefit of the child and all concerned.

During the period of time between completion of the hearing and the receipt of the decision, staff should maintain their professionalism, implementing the child's program and being as available as possible to respond to parents' questions and concerns. Part of staffs' professional responsibility is to facilitate positive communication with parents for the best interests of the child. Obviously, the child's educational program must continue without interruption while the decision is awaited. During this time, perhaps even more than during the pendency of the hearing itself, it is important for both staff and parents to minimize as much as possible any adverse effects on the child. This means that regardless of strains on the adults involved, all should strive to maintain a positive attitude around the child.

Once the hearing decision is announced, regardless of the findings, service providers and administrators must continue maintenance of their professionalism. The provider's role is to implement the child's program and the hearing decision. All must work toward putting any negative feelings behind them, with the goal of providing an appropriate educational program from which the child can benefit. Sometimes, unfortunately, the relationship of the parents and providers remains strained despite efforts to improve it. When that occurs, it may be helpful to bring in an administrator to meet with staff and parents to help identify ways to rectify the situation. Staff must never forget that the child's parents are doing what they believe is in the best interest of their child. Although staff may disagree with how that should occur, they must respect the right of the parents to seek what they believe is best.

CONCLUSION

Hearings are difficult, emotionally draining experiences for everyone concerned, yet they are a crucial component of the right to due process. The role of the attorney/case presenter is to make an uncomfortable situation as comfortable as possible through careful selection and preparation of witnesses and documents. The role of the witness is to provide honest, accurate, concise, complete information to the attorney/case presenter in a timely fashion and to be as well

prepared for testifying as possible while maintaining a professional relationship with the child and family. The end-goal for all is an appropriate educational program for the handicapped child. Proper preparation and expert professional testimony will go far in assuring achievement of this goal.*

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*This monograph is not intended to constitute legal advice. Specific legal questions should be resolved after consultation with legal counsel.

Appendices

Appendix A. Attorneys' Fees Act

Appendix B. Case Preparation Checklist

Appendix C. Testimony Preparation Guide

Appendix D. Case Study

APPENDIX A
Attorneys' Fees Act

The Attorneys' Fees Act became effective in August 1986 after 2 years of deliberations and negotiations in Congress. The formal title of this law is the "Handicapped Children's Protection Act of 1986," (hereafter "Act"). This new law operates as an amendment to the Education of the Handicapped Act (EHA).

The Act provides that parents of handicapped students may obtain reimbursement from school systems for their attorneys' fees, as well as expert fees and other costs, if the parents "prevail" in special education cases. For special education administrators, the Act imposes a new and significant dimension to the already complex mandates and procedures in special education. The potential financial impact of this new law is unquestionably significant. However, school systems can take steps that will avoid or minimize their exposure to attorneys' fees. The following reviews portions of the Act and recommends steps to avoid or minimize exposure to attorneys' fees.

The most significant aspects of the Act are as follows:

> (B) In any [special education] action or proceeding brought under [the EHA] . . . , the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.
>
> (C) . . . Fees awarded . . . shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.
>
> (D) No award of attorneys' fees and related costs may be made . . . for services performed subsequent to the time of a written offer of settlement to a parent or guardian if—
>
> (i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;
>
> (ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that—

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding;

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 1415 of [the EHA].

The Act specifically provides that it applies to all special education cases that were brought after July 3, 1984, as well as cases brought before July 4, 1984, but still pending on that date.

Certain provisions of the Act deserve some clarifying comments. Paragraph (B) allows for parents to be reimbursed if they prevail, but it does not provide for school systems to be reimbursed if they prevail. As such, school systems will have no claim for fees in special education cases, absent unusual circumstances. The term "prevail," while not defined in the Act, may not mean that parents must "win" all issues in the special education case. Rather, parents may be entitled to at least a portion of their fees if they are successful on some of the significant issues. Next, paragraph (C) provides that fees are to be awarded at the "prevailing rate." After much deliberation, it appears that Congress, by this provision, decided to allow federally and state

funded advocacy groups to be paid fees comparable to what private attorneys receive even though the advocacy group attorneys have already had their fees paid through federal or state funds. At the same time, paragraph (C) precludes a "bonus or multiplier," which would otherwise have allowed extra fees in unique or otherwise complicated cases. In addition, though the Act does not define "costs," the legislative history indicates that parents may also be entitled to fees charged by experts who test the child or testify at a special education proceeding. Other costs are also reimbursable.

Critical to special education administrators, the Act indicates how attorneys' fees and other costs can be minimized or avoided. Paragraph (D) of the Act provides that no fees will be awarded for legal work done after a settlement offer if the school system makes a written offer of settlement, within specific timelines, which the parents reject, and the ultimate decision in the case is not more favorable than the offer of settlement. As a result, school systems must seriously weigh their chances of success before the initial hearing is held. If appropriate, the school system should make a formal written offer of settlement to the parents. In essence, the offer should be what the school system reasonably expects the decision to be in the case. It is extremely important that the offer be specific and detailed, because any ambiguity or doubt will be construed against the school system. Further, paragraph (E) indicates that attorneys' fees will still be allowed if the parents were "justified in rejecting the settlement offer." The legislative history indicates that the parents may justifiably reject an offer if they were not given sufficient time to fully investigate and evaluate the offer. Thus, if appropriate, school systems should postpone a special education hearing if the parents reject an offer on the basis that there was insufficient time to evaluate the settlement proposal.

It must be noted, however, that under paragraph (G), otherwise reduced attorneys' fees will not apply if the school system violated the due process provision of the EHA. As a result, special education administrators must ensure that their staff and teachers are fully aware of the due process procedural safeguards for parents and handicapped students. Failure to implement these safeguards can result in payment of attorneys' fees.

In summary, special education administrators can take some simple steps to minimize or avoid attorneys' fees in special education cases. As mentioned, the first step is to ensure that all special education staff are implementing the due process requirements of the law. At minimum, yearly in-service training programs are required. Second, key special education staff should be trained in the proper procedures to use in evaluating a case and in developing an offer of settlement

that will be sufficiently detailed to meet the requirements of the Act. The costs of any such training program will usually be far less than the award of attorneys' fees in a single special education case.

APPENDIX B
Case Preparation Checklist

	Date
Application for Hearing Received	_____
Records Requested	_____
Witnesses Notified	_____
Date Set for Hearing	_____
Hearing Officer Selected	_____
Parents Notified of Hearing	_____
Documents Selected	_____
Briefings Held	_____
Documents Copied	_____
Documents Sent to All Parties	_____
Hearing Held	_____

APPENDIX C
Testimony Preparation Guide

PERSONAL INFORMATION

Student: _____ DOB: _____ Race/Ethnicity: _____ Sex: ___

Handicapping Condition:_____

Parent/Surrogate/Legal Guardian:_____

School Presently Attending:_____

TESTING INFORMATION

Achievement, Intelligence Tests

	Past Year	*Current Year*
Achievement Measure Used		
Date Used		
Examiner		
Reading Achievement Grade Equivalent		
Reading Achievement Standard Score		
Math Achievement Grade Equivalent		
Math Achievement Standard Score		
Written Language Grade Equivalent		
Written Language Standard Score		
Spelling Grade Equivalent		
Spelling Standard Score		
Knowledge Grade Equivalent		
Knowledge Standard Score		
Motor Skills Age Level		
Oral Language Skills Age Level		
Intelligence Test Administered		
Date of Test		
Test Examiner		
Verbal Score		
Performance Score		
Full Scale		

(Continued)

TESTING INFORMATION (*Continued*)

DSM III/Specific Behaviors/Medical Information

DSM III AXIS (I, II, III, IV, V)_____

Seizure Disorder_____

Medications_____

Known Medical Conditions_____

Verbally Assaultive_____

Physically Assaultive_____

Suicide Ideation/Gestures_____

Drug Involved_____

Other Behaviors_____

HEARING ISSUES

Placement:

_____ _____

_____ _____

Diagnosis:

_____ _____

_____ _____

Services (FAPE):

_____ _____

_____ _____

Due Process/Procedures:

_____ _____

_____ _____

GENERAL NOTES AND IMPORTANT DOCUMENTS LIST

Notes:	Document No.
_____	_____
_____	_____
_____	_____

APPENDIX D
Case Study

The following presents a case study of an actual hearing. The facts of the case have been altered to ensure confidentiality and to provide clarity in illustrating some of the points covered in *Preparation for Special Education Hearings: A Practical Guide to Lessening the Trauma of Due Process Hearings.*

PROFILE OF THE CHILD

James was a 13-year-old student who had been diagnosed as learning disabled. His placement was in a self-contained special education program in a public middle school. Several psychological evaluations placed him in the low average range. Testing had remained consistent with the latest Wechsler Intelligence Scale for Children-Revised (WISC-R), revealing a Verbal IQ of 88, Performance IQ of 100, with a Full Scale IQ of 92. Subtest scores ranged from a low of 4 on Coding to a high of 13 on Picture Completion. Achievement Scores in the Woodcock-Johnson Psycho-Educational Battery revealed the following grade-level scores:

Reading	1.9
Math	3.5
Written Language	2.3
Knowledge	6.2

The Clinical Evaluation of Language Functions, Elementary Level Screening Test, gave the following percentile ranks:

Processing	0
Production	8
Total	2

Projective testing described James as vulnerable and isolative. He was found to be generally depressed.

James's school history showed that he had been in self-contained special education placements for learning disabilities since the second grade. Academic progress had been minimal. Some growth had been achieved in math and general knowledge, but James remained essentially a nonreader. The current Individualized Educational

Program (IEP) called for self-contained placement for all academic subjects, an adaptive physical education class, speech therapy 1 hour per week delivered in two half-hour sessions, and consultation by the school psychologist.

PREHEARING ISSUES

The Due Process Hearing Application stated that James's mother was appealing his placement because "the placement is inappropriate for his needs as far as education and becoming self-supportive."

Because the stated reasons were very general, the local school system requested that an informal conference be held to ascertain specifically what the issues were and to attempt to resolve the concerns of the parent and make modifications in the proposed placement if appropriate. The mother agreed to the meeting. Participating in the conference were the following:

- James's mother
- Private psychologist, who had recently tested James
- Attorney for the parent
- Teacher of the public school program
- School psychologist
- Supervisor of special education, acting as chair
- Attorney for the school system

Very early in the conference it was apparent that the matter was not going to be resolved prior to hearing. The mother stated that she believed that James needed private school placement and indicated that she had given the school system 6 years to work with her son and he hadn't made "any" progress. The private psychologist indicated that James was suffering from a severe learning impairment involving difficulties with memory, problems with visual-motor coordination, and problems with all verbal tasks. His opinion was that James's particular kind of learning disability was among the most difficult to remediate and that he was going to need the most skilled possible team to help him.

After the conference, a letter was forwarded to the parents outlining the issues and listing the modifications in the proposed program that the school had suggested. The issues for the hearing, framed at the conference, were as follows:

1. The parents rejected the proposed self-contained placement because:

a. James has failed to learn how to read.
b. James was embarrassed because he is learning disabled.
c. The school system has failed to teach James, and he doesn't possess the special skills necessary to allow him to progress.

2. James needs to be placed in a private school. (A particular school was suggested by the private psychologist.)
3. James needs special structure and consistent "pushing" to motivate him for growth. A person trained in these techniques needs to be available to James on a regularly scheduled basis.

It thus appeared that the prehearing issue was one of placement (i.e., public versus private).

BRIEFING

Prior to the briefing, the school system had selected the appropriate documents for the hearing, including school history; psychological, educational, and speech-language testing; current and past IEPs; an observation report describing James's participation in a school club; and copies of letters and notices (including the conference report letter outlining the issues) sent to the parents. Witnesses had been selected as follows:

- School psychologist
- Speech-language pathologist
- Classroom teacher
- Supervisor of special education

Initial discussions at the briefing, conducted by the attorney for the school system, centered on the general beliefs of the total team concerning James's lack of progress. The classroom teacher was especially concerned that, since she had taught James for a full year and was scheduled to teach him for the coming year, her abilities, training, and expertise would be attacked. She stated her belief that James's disabilities were severe enough that he might never be able to read in any functional way. Although she could show no significant growth in the mechanics of reading, James was showing growth in mastering content areas as evidenced from his general knowledge scores on objective test data. She described her use of tapes, records, and audiovisual aids to develop James's abilities.

The speech-language pathologist described the work on linguistic concepts that she was doing with James and the cooperative plan for integrating her work into the classroom structure.

The psychologist explained his involvement with the classroom teacher in assisting with positive feedback to James and motivation techniques.

The supervisor, who had conducted an observation, described James's positive interaction with his peers and remarked that, though certainly not a leader, he was not isolative or withdrawn in that particular social situation.

As the group discussed their anxieties and their opinions, it became clear that all witnesses were in agreement with the school system's position that James's needs could be met appropriately in the proposed public school placement and that it was the least restrictive appropriate environment for him.

The next phase of the briefing consisted of a full and open discussion of the issues and contentions of the case. Everyone agreed it appeared that the issue of placement would be the only subject of the hearing. However, the psychologist raised the possibility that James's emotional stability might be brought up because of the information contained in previous projective testing. Since the private psychologist's latest testing report had not yet been shared with the school system, it was possible that the report would raise a diagnostic question as to serious emotional impairment. To prepare for this eventuality, the psychologist was assigned to observe James and to be prepared to answer questions regarding James's need for psychological counseling.

It was clear that the major focus of the case would be the private program versus the public program. To prepare appropriately for this argument, several approaches were developed:

1. The supervisor of special education would conduct observations of the private school.
2. Special reports would be prepared outlining curricula, course goals and objectives, and special materials available in the proposed public school placement.
3. Vitae of the staff members providing services to James would be included in the documents.

The attorney then selected the witnesses for order of presentation and began the preparation for direct examination. The school psychologist was selected as the lead witness to present both school history and diagnostic information. The rationale for this was twofold. First, he had had experience in testifying in several hearings; second, the issues regarding handicapping condition would be articulated and dealt with immediately so as not to "cloud" the placement issue later.

The second witness was the classroom teacher. Questions were designed to allow for a full explanation of the proposed program, James's progress, and special techniques being used. Particular attention was given to the teacher's familiarity with current research and practices for teaching severely learning disabled adolescents.

It was decided that the speech-language pathologist's testimony would focus on her recent testing, the therapy sessions with James, and the integration of special techniques into the classroom setting.

The supervisor of special education would end the testimony, serving as an "expert" witness. Observations at both private and public placements would be discussed, and her opinion as to why the proposed placement was appropriate would be explained.

Suggested cross-examination questions were posed to each of the witnesses, and time was taken to role-play. Because the parents' documents and list of witnesses had not been received at the time of briefing, only general questions to be used during that cross-examination were developed.

PARENTS' DOCUMENTS AND CASE PREPARATION

The parents' documents and witness list proved the value of the briefing recently conducted. Many of the documents were the same as those being presented by the school system; however, two new documents were especially significant:

1. *Private Psychologist's Report.* The cognitive measures on the psychological report remained consistent with previous testing done both privately and by the school system. Achievement measures, including the Gray Oral Reading Test (Grade equivalent 1.4) and the Woodcock Reading Mastery (Grade equivalent 1.6), were also consistent with school system testing. The sections dealing with test performance, however, described James as enormously wary and depressed and as finding the assessment extraordinarily difficult and painful. Conclusions drawn from this observation were that James found anything associated with classroom work exhausting and that he would require great support and sympathy to accomplish academic tasks. Recommendations included psychotherapy on at least a weekly basis. There was no diagnosis of serious emotional impairment; however, the narrative referred to James as seriously depressed. The concluding paragraph of the report stated that although James had been in special education for many years, his reading had barely improved. Further, it was stated that if James had any chance at all of learning

he must be immediately placed in the best possible situation where he would have access to skilled specialists from many fields who would be able to focus and try to find alternative ways of teaching him so he could overcome his serious handicap. It was stated that the only place where this could be accomplished was the private school.

2. *Private School Fact Sheet.* The fact sheet consisted of 10 pages of information about the private school and its philosophy. Emphasis was placed on nontraditional methods of teaching using the creative arts and individual tutoring sessions. Descriptions were given of a media center that was equipped with tape recorders, talking books, typewriters, and computers. Supportive staff was described to include psychologists, speech-language therapists, diagnostic-prescriptive teacher, artists, swimming instructors, and physical education instructors. The training of the staff, as well as general comments concerning pupil progress, was also discussed.

The witness list included the private psychologist, a representative from the private school, and a psychiatrist.

To fully prepare for the case, a second briefing was scheduled the day before the hearing. The parents' documents had already been made available to the staff so that they would be prepared to discuss them in detail and make suggestions to the attorney for some specific cross-examination questions of the parents' witnesses.

The staff attitudes at the second briefing had markedly changed. Although still concerned and anxious over the issues related to James's progress, they expressed some resentment over what they perceived to be an unfair comparison of the proposed program and the private school. Further, the classroom teacher and the school psychologist observed that although they saw James as lacking in self-confidence and being somewhat withdrawn, they would not describe him as "seriously depressed." Using the private psychologist's report to bolster their argument, they pointed to examples such as "takes pride in his work, maintained a sense of humor, clearly a young man who has not yet given up hope," and "he relates comfortably and easily and has a lot to say."

The proposed program description that had been prepared, coupled with the supervisor's observation at the private school, allowed for a comparison that showed many more similarities than differences. This testimony was viewed as being particularly strong inasmuch as this would be the only witness who had seen both placements.

Concentration for this briefing was placed on cross-examination. Each witness for the school system was carefully led through a series

of possible questions, with time given for the witnesses to prepare and review their responses.

Cross-examination for the parents' witnesses was then discussed. Some of the possible questions included the following:

- Private Psychologist
  1. Are you a school psychologist?
  2. Do you have any teaching experience?
  3. Have you ever visited the proposed placement?
  4. What might be the emotional effect of placing a student with learning disabilities in a school with only handicapped children?
- Psychiatrist
  1. Have you ever observed James in an educational setting?
  2. Have you ever visited the proposed placement?
  3. Are you familiar with the federal definition of serious emotional impairment?
- Private School Representative
  1. Have you ever visited the proposed placement?
  2. Have you ever tested or taught James?
  3. On what do you base your opinion that your school would be able to significantly improve James's ability to read?

The second briefing concluded with a reminder to all witnesses to carefully review the documents and their testimony.

THE HEARING

The hearing was conducted in only one day, which is somewhat unusual. The school system presented its case first. The attorney outlined the school system's position in his opening statement and confirmed that the only issue before the hearing officer was the appropriateness of the proposed placement. Each witness then presented direct testimony in turn, with cross-examination going much as expected. The classroom teacher was asked to give an opinion as to why James had failed to make academic progress, and she answered in part using the private psychologist's statement that James's particular kind of learning disability is among the most difficult to remediate.

The presentation of the parents' witnesses followed along anticipated lines. All three witnesses indicated that the proposed public placement might not be inappropriate for James but, in their opinion, certainly was not the "best" placement for him. These statements

allowed the school system attorney to point out in closing argument that the best placement was not the issue in the case, but that the issue was an appropriate program that would reasonably meet James's educational needs.

As had been predicted, none of the parents' witnesses had visited the proposed placement, nor had they observed James in an educational setting; thus the testimony of the school system staff was enhanced and strengthened. The testimony of the supervisor of special education, who had knowledge of both the private and public setting, proved highly significant.

An interesting aspect of the hearing came through the testimony of the psychiatrist. During both direct and cross-examination, he stated that there were no signs of clinical depression but rather that James needed a supportive, accepting atmosphere in which to learn. He testified that his involvement had been with the entire family in an effort to have both James and his parents accept his handicap and allow him to be thought of, as much as possible, as a normal child. These statements provided the framework in which the school system attorney argued for James to be placed in the least restrictive environment, which was the proposed public placement, and to be given the opportunity to interact with normal peers.

At the conclusion of the hearing everyone agreed that, because of careful preparation and appropriate performance at the hearing, the experience was a positive one and one that was personally satisfying. As is usually the case, the witnesses were unable to predict the hearing officer's decision.